

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
SLO Cellular, Inc. d/b/a Cellular One of)	
San Luis Obispo and)	
Entertainment Unlimited, Inc.)	
)	
Section 68.4(a) of the Commission's Rules)	
Governing Hearing Aid Compatible)	
Telephones)	WT Docket No. 01-309
)	
Request for Temporary Waiver, or)	
Temporary Stay, of)	
Section 20.19(c)(2)(i) of the Rules)	

To: Chief, Wireless Telecommunications Bureau

PETITION FOR TEMPORARY WAIVER OR TEMPORARY STAY

SLO Cellular, Inc. d/b/a Cellular One of San Luis Obispo ("SLO") and its commonly-controlled affiliate Entertainment Unlimited ("EU") (collectively "the Petitioners"), by their attorney and pursuant to Sections 1.3 and 1.925 of the Commission's Rules, hereby request a one-year temporary waiver, or temporary stay, up to and including September 16, 2006, of the requirements contained in Section 20.19(c)(2)(i) of the Rules that the Petitioners include in their handset offerings at least two handset models per air interface that comply with Rule Section 20.19(b)(1), and make available in each retail store owned or operated by them all of these handset models for consumers to test in the store. In support hereof, the following is shown:

Background

1. SLO is the licensee of Cellular Radiotelephone Service Station KNKQ332, serving the California 5 – San Luis Obispo RSA. EU is the licensee of Broadband Personal Communications Service (“Broadband PCS”) Stations KNLF915 (Frequency Block D, Salinas - Monterey, California BTA), KNLG742 (Frequency Block D, San Luis Obispo, California BTA), KNLG743 (Frequency Block F, San Luis Obispo, California BTA), KNLG744 (Frequency Block D, Santa Barbara – Santa Maria, California BTA), WPOK945 (Frequency Block C, Bakersfield, California BTA) and WPOK946 (Frequency Block C, Visalia – Porterville – Hanford, California BTA). SLO and EU (individually and collectively) have fewer than 500,000 subscribers. As such, they are Tier III Commercial Mobile Radio Service (“CMRS”) providers, as defined in the Commission’s Non-Nationwide Carriers Order (Order to Stay), 17 FCC Rcd. 14841, Para. No. 22 (2002).

2. The digital portion of both the cellular system and the Broadband PCS systems employ the Time Division Multiple Access (“TDMA”) air interface. At present, no other digital air interfaces are used. The Petitioners market some twelve digital wireless telephone models manufactured by Ericsson, Nokia and Motorola. All are tri-mode telephones (*i.e.*, analog cellular, TDMA cellular and TDMA Broadband PCS). None of these handsets meets a U3 rating for radio frequency interference under ANSI Standard C63.19.

3. With respect to their cellular and Broadband PCS systems, the Petitioners plan to replace the existing TDMA facilities with facilities using the Global System for Mobile Communications (“GSM”) air interface. The Commission has recognized that

TDMA infrastructure equipment and handsets are being discontinued by the manufacturers. See, e.g., Digital Wireless TTY Order (CC Docket No. 94-102), 17 FCC Rcd. 12084, Para. Nos. 12 – 13, 21 – 22 (WTB 2002). In this regard, the Petitioners are unable to purchase additional TDMA handsets from the handset vendors because such handsets simply are unavailable.

Rule Section 20.19(c)(2)(i) Requirements

4. Section 20.19(c)(2)(i) of the Commission's Rules specifies that "each provider of public mobile radio service must ... [i]nclude in its handset offerings at least two handset models per air interface that comply with Section 20.19(b)(1) by September 16, 2005, and make available in each retail store owned or operated by the provider all of these handset models for consumers to test in the store ..." Rule Section 20.19(b)(1) specifies that a "wireless phone used for public mobile radio services is hearing aid compatible ... if it meets, at a minimum," a U3 rating for radio frequency interference under ANSI Standard C63.19. Thus, the rule requirement is generally applicable to all Tier III CMRS carriers. It requires the Petitioners to offer, and to make available for in-store testing by consumers, for their two TDMA digital air interfaces (*i.e.*, TDMA for cellular and TDMA for Broadband PCS) at least two Hearing Aid Compatible ("HAC") digital wireless telephones meeting a U3 rating under ANSI Standard C63.19 for radio frequency interference by the September 16, 2005 implementation deadline. Because the Petitioners offer more than two digital wireless telephones for the TDMA air interface, they do not qualify for the *de minimis* exception codified in Section 20.19(e)(1) of the Commission's Rules.

Waiver Standard

5. The Commission has indicated generally that waiver requests of the HAC digital wireless handset requirements will be evaluated under the general waiver standard set forth in Sections 1.3 and 1.925 of the Rules and the standards set forth in WAIT Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969), *appeal after remand*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972) and Northeast Cellular Telephone Company v. FCC, 897 F.2d 1164 (D.C. Cir. 1990). Hearing Aid Compatible Telephones (WT Docket No. 01-309 – Order on Reconsideration and Further Notice of Proposed Rulemaking), FCC 05-122, released June 21, 2005 at Para. No. 50 (“Order on Reconsideration”).

6. Section 1.3 of the Rules states, in relevant part, that “[a]ny provision of the rules may be waived by the Commission on its own motion or on petition if good cause therefor is shown.” Section 1.925(b)(3) of the Rules states that the “Commission may grant a waiver request if it is shown that: (i) [t]he underlying purpose of the rule(s) would not be served or would be frustrated by application to the instant case, and that a grant of the requested waiver would be in the public interest; or (ii) [i]n view of unique or unusual factual circumstances of the instant case, application of the rule(s) would be inequitable, unduly burdensome or contrary to the public interest, or the applicant has no reasonable alternative.” Under WAIT Radio and Northeast Cellular Telephone Company, a rule waiver “may be granted in instances where the particular facts make strict compliance inconsistent with the public interest if applied to the petitioner and when the relief

requested would not undermine the policy objective of the rule in question.” Order on Reconsideration, Para. 50 n. 158.

**A Waiver Is Warranted Because Compliant
TDMA Handsets Are Not Available To The Petitioners**

7. The reason in support of this waiver request is starkly simple and can be concisely stated: There are no HAC compliant digital wireless telephones using the TDMA air interface available for purchase by wireless carriers, such as the Petitioners, that meet a U3 rating under ANSI Standard C63.19 for radio frequency interference. As a result, compliance with the requirements of Section 20.19(c)(2)(i) of the Rules is an impossibility, and, therefore, a temporary waiver of the Rule’s requirements is clearly warranted.

8. By way of background information, it does not appear that handsets using the two prevailing wireless air interfaces for cellular and Broadband PCS, *i.e.*, GSM and Code Division Multiple Access (“CDMA), are even available for purchase by Tier III carriers. In adopting the Rule Section 20.19(c)(2)(i) September 16, 2005 implementation deadline for Tier II and Tier III CMRS carriers, the Commission projected (but, obviously, could not assure) that digital wireless handsets meeting a U3 rating under ANSI Standard C63.19 for radio frequency interference would be made available by the manufacturers for purchase by smaller carriers by that date. Hearing-Aid Compatible Telephones (WT Docket No. 01-309 – Report and Order), 18 FCC Rcd. 16753 (2003). While some industry progress has been made toward developing compliant handsets generally, it does not appear that research and development activities have reached the point where the handset manufacturers can make the handsets commercially available to any carrier

(large or small) for any of the air interfaces. Thus, for example, the most recent report in this Docket by The Alliance for Telecommunications Industry Solutions (“ATIS”), filed on May 17, 2005, states “that a number of recent, substantive developments have made it difficult for handset vendors to evaluate their products for hearing aid compatibility pursuant to the C63.19 Standard;” that each “of the wireless air interface technologies (CDMA, GSM, iDEN, TDMA) has challenges to overcome in order to achieve hearing aid compatibility in accordance with the C63.19 Technical Measurement Standard;” and that the “ability to combine air interfaces as well as multiple frequency bands within a single wireless device creates tougher challenges and increases the level of complexity for achieving [Hearing Aid Compatible Wireless Devices].” See ATIS’ “Hearing Aid Compatibility Report #3,” filed May 17, 2005 at pages 3 and 7. Statements submitted by individual handset manufacturers as part of the ATIS report indicate that some have a few handset models **believed** to be compliant, but it appears that no compliant handsets have been made available commercially for purchase by any carrier, large or small. In view of the fact that it does not appear that HAC compliant digital wireless handsets are available for the widely-prevalent GSM and CDMA air interfaces, it is not surprising that the handsets are not available for the TDMA air interface, a technology that is being discontinued by the equipment and handset manufacturers.

9. Assuming for purposes of argument that some compliant digital wireless handset models are commercially available for the TDMA air interface, it is nevertheless clear that only a comparatively small number are being made and that none are available for purchase by Tier III carriers, such as the Petitioners. It is clear that the handset

manufacturers concentrate on meeting the needs of the larger (*i.e.*, Tier I) carriers, to the exclusion of smaller carriers in the early stages of new product deployment.

10. Given these facts and circumstances, it seems abundantly clear that the temporary relief requested herein is warranted and in the public interest, and that good cause exists to grant the temporary waiver requested. Where the Commission's projections of technological feasibility and commercial availability do not pan out, waiver of the requirements would appear to be particularly appropriate. Indeed, basic principles of administrative law prohibit the Commission from compelling carriers to do the impossible. *See, e.g., Alliance for Cannabis Therapeutics v. DEA*, 930 F.2d 936, 940 (D.C. Cir. 1991); *Hughey v. JMS Development Corp.*, 78 F.3d 1523, 1530 (11th Cir. 1996). Furthermore, the Commission has acknowledged that Tier II and Tier III CMRS carriers "have much less ability than the nationwide CMRS carriers to obtain specific vendor commitments necessary" to deploy the equipment needed to meet regulatory requirements; that "handset vendors ... give priority to the larger, nationwide carriers;" that the deployment needs of the larger carriers create "downstream delays for Tier II and III carriers;" and, accordingly, "that there are temporary and special circumstances applicable to [Tier II and Tier III carriers] that constitute a sufficient basis to grant a stay on a limited and temporary basis" from Commission-imposed regulatory requirements. Non-Nationwide Carriers (Order to Stay), 17 FCC Rcd. 14841, Para Nos. 10 and 11 (2002). *See also, FCI 900, Inc.*, 16 FCC Rcd. 11072 (Comm. Wir, Div., WTB 2001) (granting all 900 MHz MTA licensees an extension of the construction deadline so that they might deploy advanced digital 900 MHz systems, where the subject digital voice equipment was not commercially available in sufficient quantities in time to meet the

five-year construction deadline).¹ The Petitioners simply have no control over the equipment development and distribution practices of the handset manufacturers. The lack of available digital wireless handsets for the TDMA air interface that meet the Commission's HAC requirements is, quite obviously, a circumstance clearly beyond the Petitioners' control. In view of the unique or unusual factual circumstances present here, application of the rule would clearly be inequitable, unduly burdensome and contrary to the public interest. In view of the fact that compliant digital wireless handsets for the TDMA air interface are simply not available, the Petitioners clearly have no reasonable alternative but to request the instant waiver.

11. The Petitioners wish to assure the Commission that they are committed to providing their hearing impaired subscribers with digital wireless handsets meeting a U3 rating under ANSI Standard C63.19 at the earliest practicable date, and that they will do so promptly once their GSM facilities are installed and operational, and once HAC compliant dual-mode (*i.e.*, GSM cellular and GSM Broadband PCS) GSM handsets become generally available to Tier III carriers. In this regard, it should be emphasized that if the Petitioners had their 850 MHz (cellular) and 1900 MHz (Broadband PCS) GSM facilities already in place and operational, and could obtain an adequate supply of dual-mode GSM handsets that were HAC compliant for Broadband PCS use only, they

¹ Additional case precedent supports this position. See Leap Wireless International, Inc., 16 FCC Rcd. 19573 (Comm. Wir. Div., WTB (2001) (granting extension of time so that licensee might deploy "high data rate" wireless technology that was not available in time to meet the five-year construction requirement); Monet Mobile Networks, Inc., 17 FCC Rcd. 6452 (Comm. Wir. Div., WTB 2002) (granting extension of time so that licensee might deploy "high data rate" wireless technology that was not available in time to meet the five-year construction requirement); and Warren C. Havens, Mimeo DA 04-2100, adopted July 12, 2004 (granting extension of the five-year construction requirement for

would be entitled as a matter of law to an automatic temporary waiver of the Rule Section 20.19(c)(2)(i) requirements. In Cingular Wireless, LLC, FCC 05-166, released September 8, 2005, the Commission granted blanket temporary relief, until August 1, 2006, to all wireless carriers using dual-band digital wireless GSM handsets in the cellular and Broadband PCS bands if the handsets are compliant for Broadband PCS operations only. The Commission's action was taken in view of technical difficulties being experienced in developing HAC compliant handsets for GSM cellular operations. In view of this Commission action, it would be highly inequitable for the Commission to deny the relief requested here on the facts presented. This is because HAC compliant TDMA handsets simply cannot be obtained by the Petitioners from the handset manufacturers in view of the ongoing industry phase-out of the TDMA air interface as an available wireless technology, a situation analogous to the technical inability to manufacture a HAC compliant GSM handset for cellular operations.

WHEREFORE, good cause shown, the Petitioners request that the instant petition be granted.

Respectfully submitted,
**SLO Cellular, Inc. d/b/a
Cellular One of San Luis
Obispo and Entertainment
Unlimited, Inc.**

Blooston, Mordkofsky, Dickens,
Duffy & Prendergast
2120 L Street, N.W.
Suite 300
Washington, D.C. 20037
Tel: 202-828-5515
FAX: 202-828-5568
E-mail: rmj@bloostonlaw.com

By: 

Robert M. Jackson
Their Attorney

Filed: September 16, 2005

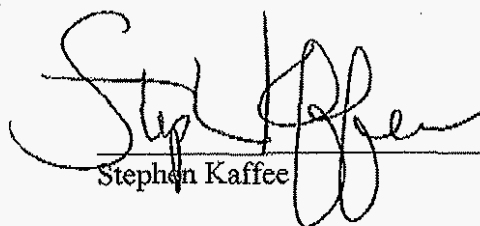
band).

DECLARATION UNDER PENALTY OF PERJURY

I, Stephen Kaffee, hereby state the following:

1. I am the Chief Executive Officer of SLO Cellular, Inc. d/b/a Cellular One of San Luis Obispo and of Entertainment Unlimited, Inc.
2. I have read the foregoing "Petition for Temporary Waiver or Temporary Stay." With the exception of those facts of which official notice can be taken, all facts set forth therein are true and correct to the best of my knowledge, information and belief.

I declare under penalty of perjury that the foregoing is true and correct. Executed on this 14th day of September, 2005.


Stephen Kaffee